

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
Digital Audio Broadcasting Systems)	
And Their Impact on the Terrestrial)	MM Docket No. 99-325
Radio Broadcast Service)	

TO: The Commission

**REPLY COMMENTS
OF
MID ATLANTIC NETWORK, INC.**

Mid Atlantic Network, Inc., the licensee of radio station WINC(FM) in Winchester, Virginia,¹ hereby replies to the Joint Comments of the Livingston Radio Company and Taxi Productions, Inc. ("Livingston/Taxi Comments") in this proceeding. Briefly, the Livingston/Taxi Comments urge the Commission to terminate the grandfathered status of so-called "superpower" FM stations whose facilities exceed those otherwise permitted in the Commission's rules, following transition into the digital environment. WINC(FM) is such a station that has been serving the Winchester, Virginia area since 1946.

While we applaud the Commission's attempt to transition radio into the digital environment, the suggestion made by Livingston/Taxi would require WINC(FM) to reduce its facilities and thereby curtail service that has been operating in the public interest for many years. Many listeners in the rural areas surrounding Winchester, Virginia, including nearby West Virginia and the Blue Ridge Mountain area would lose a

¹ Mid Atlantic Network is also the licensee of WINC-AM in Winchester, Virginia; WFVA-AM and WBQB(FM) in Fredericksburg, Virginia; WWRE(FM) in Berryville, Virginia; and WWRT(FM) in Strasburg, Virginia.

valuable radio service with no apparent gain to be had elsewhere. Furthermore, many other similarly situated stations would likely have their service similarly cut back and would want the opportunity to make their case for retaining grandfathered status. Since this proposal was not put forth by the Commission, none of these stations has been given adequate notice or opportunity for comment. Accordingly, adoption of the Livingston/Taxi proposal would not only be ill-advised, but grossly premature.

First and foremost, the suggestion to reduce the facilities of grandfathered stations such as WINC(FM) has not been made by the Commission in this or any other ongoing proceeding, and thus, its adoption would violate the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. It would also deprive affected stations of their procedural due process rights. There is nothing in the Commission's *Further Notice of Proposed Rule Making and Notice of Inquiry* in this proceeding that would give parties any reason to believe that such a proposal is even within the realm of consideration. Failure to give adequate notice was one of the factors that doomed the Commission's cross-media limits in the recent Third Circuit review of the Commission's media ownership rules, *Prometheus Radio Project v. FCC*, 2004 U.S. App. LEXIS 12720 (3d Cir. 2004). We can assure the Commission that many interested parties, both stations and listeners alike, would want to have the right to comment on such a proposal.

Aside from the procedural deficiencies of adopting the Livingston/Taxi proposal, some of the very reasons that justified grandfathering these facilities in the first place are still applicable. For example, audiences have come to rely on the existing service provided by these stations and thus, any reduction in facilities would result in a "tremendous loss of service now much relied on by listeners." *Second Report*,

Memorandum Opinion and Order in Docket No. 14185, 40 F.C.C. 720 ¶9 (1962)

(“*Revision of FM Broadcast Rules*”). When the Commission last solicited comments on this issue in 1962, the “great bulk of the petitions and comments, as well as several thousand letters which the Commission has received from listeners in California, [] opposed reduction in the facilities of existing stations.” We suspect that the Commission would find a similar outpouring of protest from loyal listeners were it to revisit this issue today.

As was the case back then, requiring cutbacks would render it difficult for many stations to serve their city of license. Especially in some of the larger cities like Los Angeles, some of these grandfathered stations would suddenly become unable to cover their city of license with their signal. The resulting disruption in service caused by required cutbacks of grandfathered stations would be particularly harsh in areas of difficult terrain. While this is particularly true in the California area, it is also a consideration wherever there is mountainous terrain, such as the Blue Ridge Mountain area of Virginia served by WINC.

Perhaps more significantly, however, the Commission found that the resulting loss of service would be much greater than the “small gains which, it appears, could result even if all of the new assignments contemplated should become actual operating stations.” *Revision of FM Broadcast Rules*, ¶13. As the Commission pointed out, those stations that would benefit from the reduction of others generally would not cover the entire loss area. *Id.*, n.7.

The Commission would also have to take into account that required cutbacks would cause a loss in coverage that “if it did not deal a death blow to the stations required

to cutback, would at least badly cripple them so as to force them to reduce the quality of their programming.” *Id.*, ¶10. Although FM is not the struggling service that it was in 1962, many stations have invested in quality programming corresponding to their existing service areas. Any reduction in service area would necessarily result in a reduction in audience, which inevitably translates to a reduction in revenue, which would of course require cost reductions and a proportional loss of quality programming. Additionally, most of these stations, like WINC, have been serving their respective audiences for more than 40 years, rendering such a proposal all the more devastating to those listeners who have come to rely on these stations over the course of several generations. We need not remind the Commission that the interests of these listeners should be paramount. *Red Lion Broadcasting Co. v. FCC*, 395 US 367, 390 (1969).

After providing notice and an opportunity for comment on this issue, and after reviewing all of the comments that were received, the great majority of which opposed any reduction in the facilities of stations whose facilities exceeded the maximums specified in the rules, the Commission concluded in 1962 that requiring any reduction in facilities “would be unwise.” *Id.*, ¶13. We have no reason to believe that the outpouring of support and the Commission’s resulting conclusion would be any different in a digital environment, should this issue be addressed again. In any event, the Commission has failed to provide any notice or opportunity for comment on this issue rendering any change in status grossly premature, if not unlawful. Ultimately, it would also be unwise for the reasons specified above, and would clearly disserve the public interest.

For the foregoing reasons, the Commission should reject the proposal made by the Livingston/Taxi Comments to end the grandfathered status of stations whose facilities exceed the maximum amount permitted by current FCC rules.

Respectfully submitted,

MID ATLANTIC NETWORK, INC.

By:

David M. Silverman

COLE, RAYWID & BRAVERMAN, L.L.P.

1919 Pennsylvania Ave., N.W.

Suite 200

Washington, D.C. 20006

(202) 659-9750

Its Attorneys

July 16, 2004